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BEFORE THE
SURFACE TRANSPORTATION BOARD

DEC 20 2011

E.I. DUPONT DE NEMOURS & COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant

Docket No. NOR 42125

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**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO COMPLAINANT'S
SECOND MOTION TO MODIFY PROCEDURAL SCHEDULE**

John M. Scheib
David L. Coleman
Christine Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to Norfolk Southern Railway Company

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SECOND MOTION TO MODIFY PROCEDURAL SCHEDULE**

Norfolk Southern Railway Company ("NS") respectfully submits its reply in opposition to E.I. du Pont de Nemours & Company's ("DuPont's") Second Motion to Modify Procedural Schedule ("Motion"). Four months ago, DuPont requested and received a 90-day extension of its time to file opening evidence. Now DuPont asks the Board to give it yet another 90 days of additional time, purportedly because of DuPont's difficulties understanding and using the traffic data that NS has produced. But DuPont substantially exaggerates these difficulties, and its assertion that it did not "possess[] sufficient information to understand and use the NS traffic data to begin the selection of the SARR traffic group" until November 21 is disproven by the fact that DuPont was using NS's traffic data to identify potential SARR traffic well before that date. Motion at 5. DuPont's request for an extraordinary extension until April 30, 2012 – six full months after it understood the traffic files well enough to begin identifying potential SARR traffic – is unjustified and excessive.

First, DuPont claims that it needs additional time because production of traffic data was suspended while the Federal Railroad Administration considered the Sensitive Security Information ("SSI") implications of that production. However, the Board fully compensated

DuPont for any SSI-related delay in producing traffic data by granting DuPont's request for a 90-day extension in August 2011. NS produced that traffic data on August 3, just 34 days after the original close of discovery. DuPont therefore received a 90-day extension of the procedural schedule to compensate for the fact that traffic data was produced 34 days after the original close of discovery. Far from being a "prejudice" requiring yet another extension, the SSI delay and accompanying extension gave DuPont more time to prepare its evidence than it had under the original schedule.¹

Second, DuPont claims that it should be given another extension because it did not have usable traffic data until late November. DuPont admits that NS has acted in good faith in discovery and promptly responded to its traffic-related questions, but DuPont contends that it did not have sufficient traffic data to begin selecting traffic for its SARR until after November 21. This claim cannot withstand scrutiny. As NS details below, DuPont had a complete and usable set of NS traffic data by October 5, and DuPont's contrary allegation is grossly exaggerated. Indeed, nearly every traffic data issue and question discussed in DuPont's Motion was completely answered by October 27 – more than three months before the current deadline for opening evidence. DuPont's assertion that the data was not usable until mid-November rests entirely on NS's minor supplemental production on November 21 of a "decoder" for the train symbols for **one percent** of the traffic records for a **single field** ("TRN") out of the 106 unique fields of traffic data. Moreover, that single field is not essential to selecting traffic or to developing a SARR. Perhaps the most compelling evidence of the insignificance of the

¹ This benefit is particularly significant for the many elements of DuPont's evidence that do not rely directly on traffic data (including market dominance evidence, unit costs for road property investment, and other essential components of a SAC presentation). Because NS completed production of nearly all responsive non-SSI information by June 30, 2011, the 90 day extension was a time windfall for DuPont's development of the numerous aspects of its case that do not require the use of traffic data.

November 21 production to DuPont's ability to use the traffic data is the fact that it was using the purportedly "unusable" traffic data to develop its case well before November. Before November 1, DuPont was using NS's traffic data to identify the specific potential SARR traffic for which it wished NS to produce transportation contracts. See Reply Ex. 1 (Nov. 1, 2011 J. Moreno email to M. Warren). Not only was the traffic data "usable," DuPont was using it! It is not entitled to any further extension simply because NS created a minor additional decoder at DuPont's request after DuPont had already begun actively using the traffic data.

Nor is there any merit to DuPont's claims that it needs additional time because of the complexity of this case. The Board took the complexity of this case into account when it established the generous original procedural schedule. DuPont dictated the parameters of this case, and it obtained both the lengthy procedural schedule that it said was necessary to prepare its case and a 90-day extension to that schedule. It should not now be heard to seek even more time on the ground that its case is complex.

In short, DuPont has failed to present evidence or argument that could remotely justify the lengthy extension it requests. While the SAC evidence in this case will almost certainly be complex, DuPont has known that since it filed this case more than 14 months ago. On two prior occasions, knowing full well the scope and challenges of the case it was pursuing, DuPont was granted exactly the generous procedural schedule length it requested. As this Reply demonstrates, NS's supplemental creation (through a special study) and production of a minute fraction of decoders for a single data field is far too thin a reed to support the unprecedented additional extension DuPont now seeks.

DuPont is asking the Board to nearly double the amount of time that the current procedural schedule allows DuPont to prepare opening evidence. The current schedule gives

DuPont 123 days from the close of discovery to prepare opening evidence; DuPont's request for another 90 days constitutes a 75% increase in that time period. The effect of granting DuPont's request would be the creation of a procedural schedule that grants DuPont significantly more time to prepare its opening evidence than the Board has afforded complainants in any other recent SAC case; that would award DuPont vastly more time to prepare its evidence than NS would have to prepare its equally complex reply evidence; and that threatens the Board's ability to decide this case within three years of the filing of DuPont's complaint, as required by statute. DuPont has not justified the relief it seeks, and its request to layer on another 90-day extension to the previous 90-day extension the Board already granted it should be denied.

Although DuPont's Motion does not justify any change to the procedural schedule, if the Board were nonetheless to grant DuPont additional time to file opening evidence, it should only do so after taking into account two guiding principles. First, NS is entitled to be treated equally. DuPont has already obtained an overly generous extension in this case; NS has not yet asked for, but reserves its right to, a first extension. If the Board grants a further extension of time for DuPont to submit its opening evidence, the procedural schedule should be adjusted (not just shifted as DuPont proposes) to give NS an equal additional amount of time to file its reply evidence. Second, while treating both parties equally, the Board must maintain a schedule that will allow this case to reach a decision within the three-year period required by statute, or the case is automatically dismissed. If these principles are taken into account, at the very most the Board could grant a 30-day extension for DuPont to file its opening evidence and a 30-day extension to NS's time to file its reply.

I. BACKGROUND

DuPont's Motion both minimizes the extraordinary amount of time that it has already been given to prepare opening evidence and exaggerates the purported difficulties it has had

using the traffic data, and this detailed background section corrects the record with a more complete chronology and factual discussion. Section A demonstrates that DuPont both received an unprecedented amount of time to prepare its opening evidence in the initial case schedule and obtained a generous 90-day extension of that timeframe to account for the effectively 34-day delay in production of traffic data that resulted from the parties and the Board awaiting a FRA order authorizing SSI production and establishing procedures for that production. Section B responds to DuPont's claims that it only recently received "complete and usable" traffic data and describes both the detailed and comprehensive traffic data that was provided to DuPont several months ago and NS's prompt resolution of every follow-up question DuPont asked about that data. Section C details the best evidence that DuPont has possessed complete and usable traffic data for some time: the fact that it was using the traffic data in October to select the potential SARR traffic for which it wished NS to produce transportation contracts.

A. DuPont Has Already Received Far More Time to Prepare Opening Evidence than Any Other Recent SAC Complainant.

DuPont filed its Complaint well over a year ago on October 7, 2010. NS and DuPont subsequently agreed on a proposed procedural schedule that was considerably longer than that adopted in other SAC cases, both to account for the relative complexities of a SAC case challenging carload movements between 140 separate lanes and to avoid overlap with other rate cases pending before the Board. *See Motion for Procedural Schedule, DuPont v. NS*, STB Docket No. 42125 (filed Jan. 10, 2011). The Board adopted the parties' proposed procedural schedule despite its unusual length. *See DuPont v. NS*, STB Docket No. 42125, at 1 (served Feb. 24, 2011). For example, the original schedule required DuPont to file opening evidence on October 31, 2011 – 389 days after it filed its complaint. Typically the Board has required a

complainant to file opening evidence approximately 240 days after the complaint is filed.² While the schedule in non-coal cases occasionally has provided more than 240 days from the complaint until the filing of opening evidence, the initial schedule gave DuPont significantly more time for opening evidence than other non-coal complainants have been given.³ Indeed, in DuPont's own previous SAC case against CSX⁴ the procedural schedule gave it 133 fewer days to file opening evidence than the initial procedural schedule in this case.¹

NS began producing documents in response to DuPont's extensive discovery requests in January 2011 – nearly one year ago. Early in the discovery process NS determined that traffic event records showing the routing of Toxic-By-Inhalation ("TIH") commodities might be considered to be Sensitive Security Information by the Federal Railroad Administration. NS promptly brought this SSI issue to the attention of DuPont, the Board, and other relevant federal agencies, and NS suspended its production of the potentially SSI traffic data pending the agency determination. (NS did not suspend its own internal document collection process for traffic data.) In the interim NS completed production of virtually all its non-SSI data and documents before the original discovery deadline of June 30, 2011. DuPont's exclusive focus in its Motion

² See, e.g., *Intermountain Power Agency v. Union Pac. R.R. Co.* ("IPA"), STB Docket No. 42127 (Jan. 26, 2011) (setting opening evidence due date on July 13, 2011 – 203 days after IPA's December 22, 2010 complaint); *Arizona Electric Power Cooperative, Inc. v. BNSF Ry. Co. and Union Pac. R.R. Co.* ("AEPCC"), STB Docket No. 42113 (Feb. 3, 2009) (opening evidence due on Day 240 after filing of complaint); *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.* ("Seminole"), STB Docket No. 42110 (Dec. 10, 2008) (opening evidence due on Day 240); cf. *South Mississippi Electric Power Ass'n v. Norfolk So. Ry. Co.* ("SMEPA"), STB Docket No. 42128 (Mar. 14, 2011) (opening evidence due date on September 2, 2011 – 248 days after filing of complaint).

³ See *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.* ("TPF"), STB Docket No. 42121 (June 23, 2010) (opening due date set for February 16, 2011 – 289 days after May 3, 2010 complaint); *M&G Polymers USA, LLC v. CSX Transp., Inc.* ("M&G"), STB Docket No. 42123 (Aug. 4, 2010) (opening due date set for April 15, 2011 – 301 days after June 18, 2010 complaint).

⁴ *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42112, at 2 (Jan. 13, 2009) (opening evidence due on July 24, 2009, 256 days after November 10, 2008 complaint).

on the production of traffic data should not obscure the fact that it received the overwhelming majority of NS's discovery responses nearly six months ago.

After the FRA issued an order confirming that traffic shipment records for TTH materials are SSI and a separate order setting forth procedures for production of SSI in STB rate cases, NS produced complete traffic records to DuPont under procedures that complied with FRA's order. *See* Motion Ex. A. Those records were produced on August 3, 2011, a mere 34 days after discovery was originally scheduled to close. DuPont subsequently sought a 90-day extension of the procedural schedule "to compensate for the delayed production of the traffic data, to allow DuPont sufficient time to review and understand the data, and to permit DuPont adequate time to develop its stand-alone cost evidence." Motion to Modify Procedural Schedule at 2, *DuPont v. NS*, STB Docket No. 42125 (filed Aug. 9, 2011). The Board granted the full 90-day extension that DuPont requested (which was 56 more days than discovery had been delayed). *See DuPont v. NS*, STB Docket No. 42125, at 1 (served Aug. 25, 2011). The Board's August 25 Order extended the discovery period until September 30, 2011 and pushed back the deadline for DuPont to file its opening evidence to January 31, 2012 (over fifteen months after it filed its Complaint).

B. DuPont Has Possessed Complete and Usable Traffic Data Since October 5.

DuPont expressly states that "[t]his Motion is not intended to cast blame or to otherwise suggest that NS has deliberately engaged in dilatory tactics." Motion at 7. Although DuPont's Motion purports "to detail the lengthy process that has been required" to obtain and understand NS traffic data, DuPont's attempt to characterize its requested extension as one necessitated by "delays in receiving complete and usable traffic data" does not withstand scrutiny. *Id.* The evidence shows not only that DuPont had all relevant traffic data files by October 5, 2011 and answers to virtually all of its "decoder" requests by October 27, but also that DuPont actually

used the traffic data to identify potential SARR traffic before November 1. DuPont's Motion attempts to obscure these facts through serial exaggerations and overstatements, but a review of the facts leaves no doubt that DuPont possessed complete and usable traffic data in early October and that it was actually using that data to begin selecting SARR traffic before November 1.

1. NS's Traffic Data.

The traffic data that NS produced to DuPont consists of four sets of records. First, NS produced shipment waybill records ("Waybill Data"), which include data on revenue associated with each carload movement, shipment origin and destination, commodity, tonnage, price authority, and car type. Second, NS produced car event records associated with each car movement ("Car Event Data"). The Car Event Data includes information on each "event" that a car encounters during shipment, including the time and date that a car arrived at or departed from its origin and destination, and any interchanges, interim points, and/or yards through which the car traveled. Along with the Car Event Data, a mileage file was provided that indicated the total miles traversed by each car, including flatcars used to transport intermodal trailers or containers. (A single shipment commonly will record dozens of "events" while en route.) Third, NS produced event data for each intermodal container or trailer movement ("Intermodal Event Data"). While in the ordinary course of business NS does not maintain an event data set for intermodal units like the one it maintains for freight cars, NS performed a special study to create a set of Intermodal Event Data for DuPont's use. The Intermodal Event Data has much of the same information as the Car Event Data, with a slightly different layout to allow links between intermodal container and trailer movements and associated equipment in the Car Event Data. Intermodal Event Data does not have associated mileage data, but mileages can be determined by linking container/trailer movements to the Car Event Data for the flatcar used to transport the

intermodal equipment. Fourth, NS produced train sheet records that show events for each train on the NS system (“Train Event Data”).

NS produced all four sets of records for every movement on the NS system for the years 2009 and 2010. These four data sets are designed to be “linked” with each other – for example, the Car Event Data produced by NS contains both a waybill field that can be used to “link” to the Waybill Data for that car and a train field that can be used to “link” to the train sheet data. And each of these data sets contains a number of fields for each record that can be used to construct a complete picture of both the revenues associated with each movement on the NS system and every event associated with that movement.

NS produced complete Waybill Data, Car Event Data, and Train Event Data to DuPont on August 3, 2011. *See* Motion Ex. A. Intermodal Event Data was produced on October 5. The traffic data included comprehensive information for each shipment – indeed, the databases included 106 unique fields.⁵ The August 3 production included detailed instructions for accessing the data, definitions of fields in the databases, and “decoders” (*i.e.*, information that explains or “decodes” the meaning of certain terms in the files).⁶ After that initial production, NS realized that one of the fields in the Car Event Data did not include complete mileage information for some of the records: NS supplied the missing information on August 31.⁷ *See* Motion Ex. B.

⁵ The Waybill Data includes 76 different fields; the Car Event Data includes 26 fields; the Intermodal Event Data includes 28 fields; and the Train Event Data includes 11 fields. Several of these 141 total fields overlap, resulting in a total number of 106 unique fields.

⁶ These instructions, definitions, and decoders are not items that exist “on the shelf” at NS; rather, they were specifically created by NS and its consultants for purposes of this case to help DuPont understand the traffic data.

⁷ DuPont’s allegation that NS “did not produce mileage information associated with the traffic data until August 31” is false. Motion at 3. NS produced mileage information on August 3, and the August 31 production merely supplemented that data. And DuPont’s claim that the traffic

DuPont muddies the waters by claiming that “traffic data” encompasses everything from “handling line data” to “TCS TDIS . . . revenue data” to “density data.” Motion at 1 n.1. That claim is both inaccurate and irrelevant. Traffic data is generally understood to be the shipment-specific waybill data, car event data, and train event data described above. But more importantly, all the other items that DuPont attempts to lump into “traffic data” were produced many months ago. For example, NS produced density data to DuPont on February 25, 2011, and it produced TCS and TDIS revenue data to DuPont on June 9, 2011.

2. NS Promptly Responded to DuPont’s Traffic-Related Follow-Up Requests.

Because of the varied forms of data that are produced in SAC cases, after a defendant railroad produces data the complainant typically poses “follow-up questions” about the data. This discovery follow-up often includes questions about the meaning of the data, requests for additional “decoders,” and requests for production of supplemental data. Discovery follow-up typically extends well past the close of discovery, although in this case NS responded to most of DuPont’s follow-up requests before the close of discovery. *See* Motion Ex. G at 1-2. In this case DuPont sent NS four follow-up requests related to traffic data⁸:

“data was unusable” until the supplemental mileage information was produced is not credible. *Id.* DuPont did not notify NS of any problem with the traffic data during the month of August, and it surely would have done so if it found the traffic data to be “unusable.” *Cf.* Motion to Modify Procedural Schedule at 2, *DuPont v. NS*, STB Docket No. 42125 (filed Aug. 9, 2011) (stating that “DuPont has begun its review of the [traffic] data”).

⁸ DuPont claims that the discovery follow-up letter it sent on September 9, 2011 “include[ed] multiple requests for decoders in order to understand various traffic data files and information on how to link various data files.” Motion at 3. DuPont appears to be referencing requests 14 through 17 of that letter, which posed questions about data NS produced for its subsidiaries Triple Crown Services (“TCS”) and Thoroughbred Direct Intermodal Services (“TDIS”). *See* Motion Ex. C at 3-5. (These questions concerned TCS and TDIS data that NS produced three months previously on June 9.) None of the other questions in the September 9 letter directly concerned Waybill Data, Car Event Data, Intermodal Event Data, or Train Event Data. NS fully responded to DuPont’s TCS and TDIS questions on September 30. *See* Motion Ex. G at 8-13.

1. A September 21 letter identifying missing car event records (to which NS responded by October 5);
2. A September 26 letter requesting additional decoders for five of the 106 fields in the traffic data (to which NS responded by October 27);
3. An October 13 letter requesting additional mileage information for intermodal containers and trailers (to which NS responded on October 21); and
4. A November 1 letter requesting additional decoders for entries in one field in the Train Event Data that correspond to 1st of the train records (to which NS responded on November 21).

September 21 Letter: DuPont sent its first follow-up requests relating to traffic data on September 21, 2011 (over seven weeks after NS produced that data). DuPont reported that the Car Event Data appeared to have failed to include all movement records associated with coal and intermodal shipments. *See* Motion Ex. D. NS immediately investigated the issue and determined that a data collection error resulted in the omission of certain event records. NS determined that the most efficient way to correct the omissions would be to produce corrected Car Event Data and to generate Intermodal Event Data. On September 29, 2011 – just eight days after DuPont identified the error – NS produced corrected Car Event files for all carload traffic. *See* Motion Ex. F at 2. On October 5, NS completed its production of replacement data by producing Intermodal Event Data. *See* Motion Ex. H at 2. Therefore, as of October 5, 2011 (118 days before the date for filing opening evidence under the current schedule), DuPont possessed complete and final versions of the Waybill Data, the Car Event Data, the Intermodal Event Data, and the Train Event Data.

September 26 Letter: On September 26, 2011, DuPont identified five data fields in the traffic files for which it asked NS to provide additional “decoders.” *See* Motion Ex. E. One of these fields was from the Waybill Data, two were from the Car Event Data, and two were from

the Train Event Data.” These decoder requests were minor, bordering on trivial. NS’s traffic data files contain 106 unique data fields, and DuPont only asked about five of them. On October 21, NS fully responded to four of the five decoder requests and informed DuPont that NS was working to create an additional decoder for the remaining field, the “TRN” field from the Train Event Data. On October 27, NS produced a decoder for the TRN field that covered 99% of the train records. *See* Motion Ex. K at 2.

While NS promptly responded to DuPont’s September 26 decoder inquiries, none of these decoders was “needed to understand the data,” as DuPont claims. Motion at 3. For example, while DuPont’s Motion devotes much attention to the “TRN” field, that field contains only a three-letter train identifier, which is not necessary for traffic selection. Data fields for which DuPont did not request any additional decoders clearly indicate the train type (e.g., loaded coal, merchandise, etc.), origin and destination stations, and other relevant information more than sufficient for DuPont to understand which trains were moving which traffic. It is ludicrous for DuPont to suggest that it was forced to sit on its hands and do nothing until NS answered every last one of its decoder requests, and if DuPont elected to do so, it cannot be allowed to justify another extension on that basis.

October 13 Letter: On October 13, DuPont sent another traffic-related follow-up letter, which complained that the Intermodal Event Records produced by NS did not have mileage records similar to the mileage data records associated with NS’s Car Event Data. *See* Motion Ex. I. DuPont asserted that this was a “major deficiency” in NS’s traffic data production and again complained about the data issues it identified in its September 21 letter (completely ignoring the

⁹ DuPont does not explain why it waited until almost eight weeks after the August 3 production to pose these decoder requests. DuPont made these “decoder” requests before NS produced corrected Car Event Data, so that provides no explanation for DuPont’s delay.

fact that NS had fully addressed those issues in its September 29 and October 5 productions). *Id.* at 1. On October 21, NS responded to DuPont by explaining that the individualized container mileage data it sought did not exist for Intermodal Event Data and that DuPont could readily ascertain the mileages for intermodal container movements by using the linked Car Event Data recording mileages for the flatcars on which the intermodal containers and trailers were transported. *See* Motion Ex. J at 1-2.

NS's October 21 letter also corrected DuPont's significant exaggerations of the scope of purported "data deficiencies." As NS explained, the fact that NS does not separately track mileages for intermodal containers and trailers and instead tracked flatcar mileages was not a "deficiency" but rather a standard practice in the rail industry with which DuPont's experienced consultants should be familiar. *Id.* at 1. NS similarly disproved DuPont's hyperbolic claims that NS had not provided "a complete data set" and emphasized both the detail and completeness of the records that NS had produced and NS's willingness to answer any additional questions that DuPont might have. *See id.* at 2. DuPont never responded to the October 21 letter and did not pose any further questions about the traffic data NS produced (other than the November 1 letter described below).

November 1 Letter. As discussed above, NS answered DuPont's September 26 follow-up letter requesting an additional decoder for the TRN field by working to develop a decoder for TRN entries that corresponded to 99% of the train event records. DuPont responded by demanding decoders for the remaining 1%. *See* Motion Ex. L. DuPont's artful assertion that its November 1 letter requested decoders for "29% of the TRN symbols" should not obscure the fact that those TRN symbols were the least-used entries and corresponded to just 1% of NS train movements. *See* Motion Ex. M at 1. Despite the minimal relevance of DuPont's November 1

request, NS again examined the remaining TRN values and was able to create decoders for 229 of them. On November 21, NS provided DuPont with this additional decoder file and informed DuPont that the remaining TRN values could not be identified and did not correspond to any standard values for road or local trains. *See id.*

DuPont's allegation that NS's November 21 production included "another critical data set that DuPont had first requested more than two months earlier, in its September 9 letter" is blatantly false. Motion at 5. None of the data produced on November 21 was requested in the September 9 letter. DuPont's footnote 15 cites the TC S71DIS follow-up questions that DuPont asked in the September 9 letter, but NS answered all those questions on September 30. *See* Motion Ex. G at 8-13. The only data included in the November 21 production other than the additional TRN decoders was a milepost file that NS produced in response to Request for Production 171 – a request that DuPont did not serve on NS until September 29, 2011. *See* Motion Ex. M at 2; Reply Ex. 2 (DuPont's Fourth Set of Discovery Requests). The milepost file is plainly not a "critical data set": the fact that DuPont did not even ask for it until the penultimate day of discovery demonstrates its relative unimportance. And even if this file were "critical," after waiting so long to ask for it DuPont can hardly use its own procrastination as a rationale for extending the deadline for it to file opening evidence.

C. DuPont Began Using the Traffic Data to Begin Selecting Potential SARR Traffic No Later Than October.

While the above discussion demonstrates that DuPont had complete and usable traffic and event files by October at the very latest, the most compelling evidence that DuPont was able to use NS's traffic files to begin selecting SARR traffic is the fact that it did so. DuPont asserts that "it was not until the November 21, 2011 NS responses . . . that DuPont possessed sufficient information to understand and use the NS traffic data to begin the selection of the SARR traffic

group” Motion at 5. In fact, DuPont was using the traffic data to identify potential SARR traffic well before that. Specifically, DuPont’s traffic data analysis had sufficiently progressed by November 1 for it to be able to identify potential SARR traffic for which it wished NS to produce transportation contracts.

One of the important elements of SAC discovery is rail transportation contracts, which are particularly relevant to estimating the potential revenue growth for SARR traffic. DuPont Request for Production 29 asked NS to produce all transportation contracts and tariffs that could have been used for any movement on NS’s system in 2009 and 2010. Because this request encompassed thousands of rate authorities, NS proposed that DuPont select the contracts it wished to review after it analyzed NS’s traffic data, which is a standard approach in rate cases and one to which DuPont did not object. Specifically, after DuPont reviewed the traffic files to determine traffic that it might wish to select for its SARR, DuPont could use the rate authority field associated with that traffic to provide NS with a list of additional contracts for production.¹⁰

No later than November 1, DuPont had a sufficient command of the traffic and event files to use those files to select 224 contracts and rate authorities that it wished NS to produce.¹¹ This selection could only have occurred by analyzing the NS traffic files to identify traffic that DuPont might wish to include in its SARR and obtaining the contract numbers from the Waybill Data for that traffic; indeed, DuPont admitted that its contract selection was based upon “the traffic data produced by NS.” See Reply Ex. 1 (Nov. 1, 2011 J. Moreno email to M. Warren (“*In reviewing the traffic data produced by NS, DuPont has identified NS contracts that we would*

¹⁰ Moreover, NS proactively produced several hundred major coal, intermodal, automotive, and industrial products contracts in May and June. DuPont has thus had a significant amount of relevant transportation contracts for over six months.

¹¹ NS has completed production of all of those requested rate authorities.

like NS to produce” (emphasis added)))¹² At no point did DuPont claim or imply that its selection of contracts was at all impeded by the single decoder for 1% of TRN entries that DuPont requested on November 1. The fact that DuPont was able to analyze the data for these purposes demonstrates how trivial the November 1 decoder request was to DuPont’s ability to identify potential traffic for its traffic group.

Therefore, before November 1 DuPont plainly was able to analyze the traffic data produced by NS in sufficient detail to determine which traffic it might wish to select for its SARR and to identify the associated rate authorities that it wished NS to produce.¹³ DuPont’s empty assertions that it could not begin to identify SARR traffic until November or December are disproven by its own conduct, and they should be rejected.¹⁴

II. DUPONT HAS NOT JUSTIFIED ANY EXTENSION TO THE PROCEDURAL SCHEDULE.

DuPont has utterly failed to justify its request for three more months of additional time to complete its opening evidence. Under DuPont’s proposal, its evidence would be due on April 30, 2012 – over eighteen months after filing its initial complaint, ten months after NS completed nearly all of its non-traffic production, nearly seven months after NS completed production of all traffic files, and over six months after NS completed responses to virtually all of DuPont’s traffic-related follow-up requests. None of the three justifications DuPont cites for this extraordinary extension have merit.

¹² See also *id.* at Attachments 1 & 2 (stating that contracts were selected from “Waybill Data”).

¹³ Indeed, since the October 27 “decoder” was produced to DuPont just three business days before DuPont informed NS of its contract selection, it appears that the “decoders” DuPont requested had little, if any, impact on its ability to identify potential traffic for its SARR.

¹⁴ DuPont’s Motion is inconsistent on the point in time that it claims it had “usable” data. At some points DuPont says it did not have sufficient information to proceed until November and at others it says that it could not proceed until December. Compare Motion at 1 (claiming inability to use traffic data until November) with *id.* at 7 (claiming inability to begin traffic analysis until “the first week of December”).

First, DuPont's claim of "prejudice" by the delay resulting from the SSI issue" is a classic red herring. Motion at 8. DuPont already sought and received a substantial extension of the procedural schedule that fully accounted for the SSI-related delay in producing traffic data. Indeed, that 90-day extension was specifically designed "to compensate for the delayed production of the traffic data [and] to allow DuPont sufficient time to review and understand the data." Motion to Modify Procedural Schedule at 2, *DuPont v. AS*, STB Docket No. 42125 (filed Aug. 9, 2011). As shown above, this more than compensated for the 34-day delay in traffic data production.

Second, DuPont is not entitled to additional time because of the "unprecedented scope" of this case. Motion at 7. The Board has already accounted for the complexities of this case by adopting an unusually lengthy procedural schedule. While most SAC complainants are required to file opening evidence on Day 240 after their initial complaint, under the current schedule DuPont's opening evidence is not due until Day 481 after its initial complaint – over twice as long.¹⁵ DuPont claims that a SAC presentation for a non-coal case challenging multiple lanes of carload traffic requires more time to develop than a typical coal case.¹⁶ But DuPont ignores the

¹⁵ For example, in *Seminole* the original schedule made opening evidence due on Day 240 after the complaint was filed – five months less time than DuPont was afforded by the original schedule in this case. *See Seminole*, STB Docket No. 42110 (Dec. 10, 2008). Indeed DuPont received substantially more time than *Seminole* even if one accounts for the two extensions later sought by *Seminole*. *Seminole* filed its opening evidence on August 31, 2009 – Day 330 after the complaint.

¹⁶ DuPont's claim that traffic selection for non-coal cases is substantially more complex than that for coal cases is questionable in light of the fact that recent coal cases have involved substantial amounts of non-coal crossover traffic. *See, e.g., AEPCO*, STB Docket No. 42113, at 15-18 (Nov. 22, 2011) (discussing various forms of non-coal crossover traffic included in traffic group). Opening Evidence at III-A-2 through III-A-5, *Seminole*, STB Docket No. 42110 (filed Aug. 31, 2009) (38.4% of traffic group was general freight or intermodal traffic). Moreover, DuPont's claim that non-coal cases require more time because "market dominance is rarely, if ever, in dispute" in coal cases is irrelevant. Motion at 6 n.17. None of the alleged traffic data problems cited in the Motion affected DuPont's ability to prepare market dominance evidence.

fact that the Board's schedule gave DuPont significantly more time than other complainants bringing similar cases have received. The Board's initial schedule gave DuPont 100 more days to file opening evidence than Total Petrochemicals USA, Inc. was given in its opening schedule, 88 more days than M&G Polymers USA, LLC received, and 133 more days than DuPont itself received for a similarly expansive carload case against CSX I.¹⁷ The length of time that the Board afforded DuPont to file opening evidence is particularly extraordinary in light of the fact that the Board has rejected proposals in other cases for similarly lengthy schedules. *See AEPCO*, STB Docket No. 42113, at 2 (Feb. 3, 2009) (rejecting parties' jointly proposed schedule under which opening evidence would have been filed on Day 346 after the complaint and instead requiring opening evidence to be filed on Day 240).

Perhaps because it recognizes the extraordinary length of time that has passed since filing its complaint, DuPont focuses instead on the gap between the close of discovery and the filing of opening evidence. Motion at 6. But here again the Board's decision to grant DuPont 123 days between the close of discovery and its opening evidence is exceedingly generous. While in some recent cases the Board has adopted procedural schedules with a 120-day gap between the close of discovery and the filing of opening evidence,¹⁸ 90 days or less is a more typical time period.¹⁹ And in this case DuPont actually has had far more than 123 days to analyze NS's responses to

¹⁷ *See TPI*, STB Docket No. 42121 (June 23, 2010); *M&G*, STB Docket No. 42123 (Aug. 4, 2010); *DuPont v. CSX I*, STB Docket No. 42112, at 2 (Jan. 13, 2009).

¹⁸ *See TPI*, STB Docket No. 42121 (June 23, 2010) (120 day gap between close of discovery and opening evidence); *M&G*, STB Docket No. 42123 (Aug. 4, 2010) (same).

¹⁹ *See, e.g., SMEPA*, STB Docket No. 42128 (Mar. 14, 2011) (79-day gap between close of discovery on June 15, 2011 and due date for opening evidence on September 2, 2011); *IPA*, STB Docket No. 42127 (Jan. 26, 2011) (91-day gap between close of discovery on April 13, 2011 and opening evidence due date on July 13, 2011); *AEPCO*, STB Docket No. 42113 (Feb. 3, 2009) (90-day gap between close of discovery and opening evidence); *Seminole*, STB Docket No. 42110 (Dec. 10, 2008) (same).

most of DuPont's discovery requests, because NS completed the bulk of its production long before the September 30 close of discovery.²⁰ In short, however "complex" DuPont's SAC presentation might prove to be (and it is less complex now after DuPont dropped challenges to thirteen case lanes in its second amended complaint), the Board has given DuPont ample time to prepare it.

Finally, DuPont's allegations that it "did not possess complete and usable traffic data" until late November are not credible. DuPont had complete and final sets of all components of the traffic data no later than October 5, and NS answered all significant traffic-related follow-up questions by October 27. But setting all those arguments aside, the critical fact is that DuPont was using the traffic data to identify traffic that it wished to examine for its SARR before November 1. As detailed above, before November 1, DuPont had a sufficient command of NS's traffic files to use those files to select 224 additional contracts and rate authorities that it wished NS to produce. *See* Reply Ex. 1 (Nov. 1, 2011 J. Moreno email to M. Warren) ("*In reviewing the traffic data produced by NS, DuPont has identified NS contracts that we would like NS to produce.*" (emphasis added))). In light of that fact, DuPont's assertion that it lacked sufficient data to "begin to select its traffic group" until November 21 or even "the first week of December" is a gross exaggeration that should be rejected out of hand.²¹

²⁰ The September 9 discovery follow-up letter that DuPont attaches at Exhibit C illustrates the extent to which NS completed non-traffic production before June 30. Every DVD production disk referenced in that letter was produced to DuPont between May 31, 2011 and June 29, 2011.

²¹ Indeed, DuPont's analysis of the traffic and event data is sufficiently progressed to the point that it can predict the size of its SARR and the number of trains that SARR will operate during its peak period. *See* Motion at 7. It is difficult to square DuPont's ability on December 12 to estimate the number of peak period trains necessary to transport the SARR traffic group with its assertion that it could not even "begin to select its traffic group and design its SARR" until "the first week of December." *Id.*

DuPont correctly states that “[t]he Board has granted extensions in prior SAC cases due to discovery delays that have impaired the Complainant’s ability to develop its SAC evidence.” Motion at 7. But what DuPont fails to mention is that it is asking for far more time for far less significant “discovery delays” than have been at issue in other cases. DuPont cites the 60-day extension that the Board granted in *Seminole* as precedent for an “extension[] . . . due to discovery delays,” but *Seminole* only shows how unreasonable DuPont’s request is. Motion at 7 n.18. Similar to DuPont, in *Seminole* the complainant cited issues relating to traffic data production and its need to fully understand the traffic data as grounds for extending the deadline for it to file opening evidence. See Complainant Seminole Electric Cooperative’s Unopposed Petition to Revise Procedural Schedule at 4, *Seminole*, STB Docket No. 42110 (filed Apr. 30, 2009). But unlike DuPont, the *Seminole* complainant narrowly tailored its extension request to the time reasonably required to prepare SAC evidence in light of the traffic data issues. While DuPont requests an extension that would make its opening evidence due 161 days after it received what it claims was “the final piece of the puzzle required by DuPont to complete and fully utilize the NS traffic data” (and 181 days after DuPont’s November 1 contract selection proving that it was using the traffic data at that time), *Seminole* asked for a 60-day extension that would have made its opening evidence due fewer than 90 days after CSXT responded to *Seminole*’s last traffic-related follow-up request.²² Applying a similar timeframe to DuPont, a 90-day period from November 1 would require no extension at all. The *Seminole* SARR included substantial volumes of non-coal traffic, and the traffic records at issue in *Seminole* were system-wide CSXT traffic records. The fact that DuPont similarly will be selecting non-coal

²² *Seminole* stated in its April 30, 2009 motion that its last follow-up request was sent “on April 24, 2009,” and that after CSXT responded to that request *Seminole* would then “be in a position to complete development of the SARR traffic group.” *Id.* at 4.

traffic for its SARR and similarly is analyzing system-wide NS traffic records to select that traffic thus provides no justification for a longer timeframe here.²³

To take another example, in *IP1* the complainant sought a 28-day extension of the date for filing opening evidence in part because “UP did not complete its responses to all of IPA’s follow-up requests until this week [*i.e.*, the week of June 20, three weeks before opening evidence was due].” Motion for Extension of Schedule at 2, *IPA*, STB Docket No. 42127 (filed June 27, 2011). In other words, because the defendant did not complete its responses to the complainant’s follow-up requests until three weeks before the deadline for the complainant to file opening evidence, the complainant asked for another four weeks, so that its opening evidence would be due just seven weeks after the defendant completed production. Here, in contrast, DuPont is asking the Board to extend the procedural schedule *over five months* after NS answered DuPont’s final traffic-related follow-up question and *over six months* after DuPont indisputably was using the traffic data to identify potential SARR traffic.²⁴ There is no precedent for such an lengthy extension, and no justification for the Board to grant it.

²³ While the Board later permitted an additional 30-day extension of Seminole’s time to file opening evidence, that extension was predicated primarily on delays in the production of transportation contracts. *See* Complainant Seminole Electric Cooperative’s Unopposed Second Petition to Revise Procedural Schedule at 2, *Seminole*, STB Docket No. 42110, (filed June 30, 2009). Here, NS has already completed production of all transportation contracts DuPont requested on November 1. Seminole also cited the unusual complexities of CSXT’s traffic data and the fact that it was the first complainant applying the procedural changes of *Major Issues in Rail Rate Cases* as grounds for its 30 day extension. Neither of those considerations apply here.

²⁴ Similarly, in *Western Fuels* the complainant cited the fact that “significant portions of BNSF’s discovery (including responses to WFA/Basin’s follow-up requests) have come after the January 21, 2005 “End of Discovery” date shown on the case schedule” as justification for a two-week extension of the date to file opening evidence. Petition to Modify Procedural Schedule at 3, *Western Fuels Ass’n, Inc. & Basin Elec. Power Cooperative, Inc. v. BNSF Ry. Co.*, STB Docket No. 42088 (Mar. 18, 2005). While the date BNSF completed production is not clear from the public record in *WFA/Basin*, it is clear that it completed its production less than three months before the complainants filed opening evidence. *See id.* at 2-3 (proposing opening evidence be filed April 19, 2005 – less than three months after January 21, 2005 close of discovery).

Indeed, DuPont's own logic does not justify a 90-day extension. Even if one accepts DuPont's assertion that it needs 120 days after the production of "complete and usable traffic data" to prepare opening evidence, see Motion at 6, NS completed its production of Intermodal Event Data on October 5. Because October 5 is 118 days before the current opening evidence deadline of January 31, DuPont's logic might justify a 2-day extension. And if one were even more generous to DuPont and presumed that its 120-day clock should not begin running until after NS answered DuPont's September 26 and October 13 follow-up letters, 120 days from NS's final October 27 response to those letters would suggest an opening evidence date of February 24, 2012. And if one took the most generous position of all and assumed that DuPont did not possess "complete and usable data" until the date when it revealed that it was actually using the NS traffic data to select potential SARR traffic for which it wanted contracts, taking November 1 as the starting point for the 120-day period DuPont says it needs would justify, at most, a 30-day extension.²⁵

In short, there is utterly no justification for a 90-day extension of the deadline for filing opening evidence, and very little justification for any extension at all. If the Board were to grant any extension, it should be limited to 30 days at the very most. However, NS strongly opposes any extension to DuPont that is not accompanied by an additional and equal extension for NS, for a one-sided DuPont extension would significantly imbalance the procedural calendar. Specifically, DuPont's proposed schedule would give it seven months after the close of discovery to prepare opening evidence and over three-and-a-half months to prepare rebuttal

²⁵ Indeed, even if the Board were to accept the utterly unsupported proposition that DuPont could not begin using NS's traffic data until November 21, 120 days from that date is March 20 – a full forty days before the opening evidence due date than DuPont requests. DuPont's Motion provides no explanation of why it is asking for more time than its own 120-day logic would suggest.

evidence – a total of ten-and-a-half months for evidence preparation – but would afford NS just four months to prepare reply evidence. Such an unbalanced schedule gives DuPont a substantial unfair advantage. Complainants and railroads are each required to present fully supported and documented evidence,²⁶ and if the Board is to hold each party to the same standard to support its evidence the Board cannot approve a procedural schedule giving one party far more time to prepare evidence than the other.

Moreover, DuPont already has been granted one extension, and NS has not sought any extensions at all. It is possible NS could confront a situation in which it might seek a reasonable extension, and NS would expect such a motion to be treated by DuPont and the Board similarly to how DuPont's first extension motion was treated.

Finally, if the Board does grant DuPont a 30-day extension of time to file opening evidence, it should make clear that the Board will not tolerate unsupported assumptions and "shortcuts" in DuPont's SAC presentation. Even without an extension, DuPont will have an extraordinary amount of time to prepare its opening evidence, and it has no excuse to submit anything less than a full and completely documented presentation in its opening evidence.

III. THE BOARD MUST ENSURE THAT ANY SCHEDULE DOES NOT JEOPARDIZE ITS ABILITY TO COMPLY WITH THE INTERSTATE COMMERCE ACT.

When considering DuPont's request for an extension that would make its opening evidence due over 18 months after it filed its complaint (and the need to treat NS equally in any modifications to the procedural schedule), the Board should bear in mind the Interstate Commerce Act's requirement that the Board resolve rate reasonableness cases within three years of the filing of the complaint. All complaints challenging the reasonableness of rail rates must

²⁶ See, e.g., *AEPCO*, STB Fin. Docket No. 42113, at 48, 63, 64, 84, 123 (served Nov. 16, 2011) (deciding issues in part based on which party submitted more detailed and specific evidence).

be brought pursuant to 49 U.S.C. § 11701. See 49 U.S.C. § 10704(b) (“The Board may begin a proceeding under this section only on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title.”). Section 11701(c) requires that a proceeding be “dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.” 49 U.S.C. § 11701(c). Because this three-year time limitation applies to “formal investigative proceeding[s] begun by the Board under subsection (a).” and because § 11701 (a) authorizes the Board to “begin an investigation under this part only on complaint,” the three-year limitation applies to this complaint proceeding.

NS fully reserves its right to make this argument, if appropriate, and believes that the statute requires a final Board decision (or dismissal of this case) by October 7, 2013. In some prior cases courts have declined to decide this issue on the merits because litigants have failed to timely raise the issue.²⁷ Accordingly, NS raises the issue now during consideration of this motion.

Granting DuPont’s request for a second lengthy extension would gravely threaten the Board’s ability to comply with this statutory time limit. DuPont filed its complaint on October 7, 2010, and under § 11701 the Board must conclude its investigation by October 7, 2013. DuPont’s proposed schedule would have final briefs due on January 31, 2013, and therefore would make it impossible for the Board to decide the case before the statutory deadline unless the Board acted on an accelerated schedule.²⁸ The effect of granting DuPont’s Motion would be

²⁷ See *BNSF Ry. Co. v. Surface Transp. Bd.*, 604 F.3d 602 (D.C. Cir. 2010); *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473 (D.C. Cir. 2006).

²⁸ The Interstate Commerce Act requires the Board to adjudicate SAC cases within nine months after the close of the administrative record. See 49 U.S.C. § 10704(c)(1). Nine months after

to make it impossible for the Board to grant any other extension in this case without either violating the statute or further cutting into the Board's own time to consider the evidence. There is no reason for the Board to substantially reduce its own time to analyze the evidence and issue a considered decision.

CONCLUSION

For the foregoing reasons, DuPont's Second Motion to Modify Procedural Schedule should be denied. If the Board nevertheless chooses to grant DuPont some additional time to file opening evidence, the procedural schedule should be adjusted to give NS an equal amount of additional time for its reply evidence.

Respectfully submitted.



John M. Scheib
David L. Coleman
Christine Friedman
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to Norfolk Southern Railway Company.

Dated: December 20, 2011

January 31, 2013 is October 31, 2013, three weeks after the § 11701 deadline for concluding this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2011, I caused a copy of Norfolk Southern Railway Company's foregoing Reply to Complainant's Second Motion to Modify Procedural Schedule to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
Sandra L. Brown
Jason R. Tutrone
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036


Eva Mozena Brandon

Exhibit 1

From: Moreno, Jeffrey [Jeff.Moreno@thompsonhine.com]
Sent: Tuesday, November 01, 2011 12:32 PM
To: Warren, Matthew J.; Moates, G. Paul; Hemmersbaugh, Paul A.
Cc: Brown, Sandra; Tutrone, Jason
Subject: NS Contracts
Attachments: Att No. 1 & Att No. 2.pdf

Matt

In reviewing the traffic data produced by NS, DuPont has identified NS contracts that we would like NS to produce in response to DuPont's discovery. Attachment No. 1 identifies NS intermodal contracts and Attachment No. 2 identifies other NS contracts.

Jeffrey O. Moreno | Partner | **Thompson Hine LLP**
1920 N St, N.W. | **Washington, DC 20036**
Office: 202 263 4107 | **Mobile:** 202 615 2494
Fax: 202 331 8330 | **Email:** Jeff.Moreno@ThompsonHine.com
Web: <http://www.thompsonhine.com>

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Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.

List of NS IM Contracts in Waybill Data to Request for Production

Contract	
1	NS 555
2	NSPQ 1001
3	NSPQ 1045
4	NSPQ 10480
5	NSPQ 11674
6	NSPQ 16949
7	NSPQ 20
8	NSPQ 20000
9	NSPQ 20054
10	NSPQ 2018
11	NSPQ 2024
12	NSPQ 20279
13	NSPQ 2037
14	NSPQ 2049
15	NSPQ 2056
16	NSPQ 2132
17	NSPQ 2134
18	NSPQ 2189
19	NSPQ 25
20	NSPQ 2619
21	NSPQ 3917
22	NSPQ 4029
23	NSPQ 4395
24	NSPQ 50007
25	NSPQ 50227
26	NSPQ 6483
27	NSPQ 6496
28	NSPQ 6649
29	NSPQ 8000
30	NSPQ 9000

List of NS Contracts in Waybill Data to Request for Production

Contract	
1	BNSF 4802
2	BNSF 6522
3	BNSF 90017
4	BNSF 90058
5	BNSF 90076
6	BNSF 90085
7	CN 10018
8	CN 13319
9	CN 13654
10	CN 15616
11	CSXT 44197
12	CSXT 83948
13	KCS 1092
14	KCS 3654
15	KCS 6280
16	NS 10794
17	NS 10796
18	NS 12615
19	NS 12939
20	NS 13051
21	NS 13727
22	NS 15013
23	NS 15696
24	NS 16468
25	NS 16721
26	NS 16748
27	NS 16981
28	NS 17050
29	NS 17051
30	NS 17052
31	NS 17064
32	NS 17091
33	NS 17204
34	NS 17255
35	NS 17472
36	NS 17508
37	NS 17563
38	NS 18016
39	NS 18334
40	NS 18346

List of NS Contracts in Waybill Data to Request for Production

Contract		
41	NS	18354
42	NS	18381
43	NS	18403
44	NS	18622
45	NS	18696
46	NS	18893
47	NS	18899
48	NS	18915
49	NS	18985
50	NS	18990
51	NS	19008
52	NS	19009
53	NS	19039
54	NS	19061
55	NS	19063
56	NS	19102
57	NS	19110
58	NS	19111
59	NS	19119
60	NS	19247
61	NS	19248
62	NS	19249
63	NS	19283
64	NS	19288
65	NS	19291
66	NS	19292
67	NS	19330
68	NS	19350
69	NS	19351
70	NS	19353
71	NS	19413
72	NS	19452
73	NS	19468
74	NS	19469
75	NS	19484
76	NS	19496
77	NS	19583
78	NS	19585
79	NS	19593
80	NS	19594

List of NS Contracts in Waybill Data to Request for Production

Contract	
81	NS 19595
82	NS 19598
83	NS 19626
84	NS 19639
85	NS 19650
86	NS 19658
87	NS 19662
88	NS 19690
89	NS 19698
90	NS 19711
91	NS 19720
92	NS 19770
93	NS 19806
94	NS 19871
95	NS 19903
96	NS 90574
97	NSEC 4304
98	NSRQ 49750
99	NSRQ 52302
100	NSRQ 64455
101	NSRQ 65263
102	NSRQ 65725
103	NSSC 65256
104	NSSC 65345
105	NSSC 80798
106	NSSC 81136
107	NSSC 82953
108	NSSC 83293
109	NSSC 88398
110	NSSC 90574
111	NSSC 91115
112	NSSC 91177
113	NSSC 91497
114	NSSC 92063
115	NSSC 92398
116	NSSC 92841
117	NSSC 93901
118	NSSC 93945
119	NSSC 94172
120	NSSC 94212

List of NS Contracts to Request Provided in Waybill Data

<u>Contract</u>	
121	NSSC 94563
122	NSSQ 12005
123	NSSQ 14134
124	NSSQ 2579
125	NSSQ 31957
126	NSSQ 35207
127	NSSQ 35592
128	NSSQ 35704
129	NSSQ 36953
130	NSSQ 36961
131	NSSQ 38227
132	NSSQ 38535
133	NSSQ 41302
134	NSSQ 41315
135	NSSQ 43405
136	NSSQ 43904
137	NSSQ 44470
138	NSSQ 45056
139	NSSQ 45112
140	NSSQ 45137
141	NSSQ 45736
142	NSSQ 50000
143	NSSQ 50001
144	NSSQ 62586
145	NSSQ 70000
146	NSSQ 70001
147	NSSQ 70148
148	NSSQ 81064
149	NSSQ 82943
150	NSSQ 85344
151	NSSQ 85363
152	NSSQ 85369
153	NSSQ 85640
154	NSSQ 87764
155	NSSQ 88244
156	NSSQ 89112
157	NSSQ 89394
158	NSSQ 89792
159	NSSQ 90400
160	NSSQ 91000

List of NS Contracts in Waybill Data to Request for Production

<u>Contract</u>	
161	NSSQ 91163
162	NSSQ 91264
163	NSSQ 91286
164	NSSQ 92288
165	NSSQ 93961
166	NSSQ 94799
167	NSSQ 95939
168	NSSQ 96641
169	NSSQ 97375
170	NSSQ 97458
171	NSSQ 97807
172	NSSQ 97845
173	NSSQ 97884
174	NSSQ 98560
175	NW 3055
176	PAL 1713
177	SOU 2892
178	ST 5085
179	UP 14413
180	UP 203
181	UP 3200
182	UP 33540
183	UP 36074
184	UP 39349
185	UP 4915
186	UP 51548
187	UP 73893
188	UP 79429
189	UP 81457
190	UP 91676
191	UP 92649
192	UP 94135
193	UP 95235
194	UP 95667

Exhibit 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS & COMPANY)	
)	
Complainant)	
v.)	Docket No. NOR 42125
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
Defendant)	
)	

**COMPLAINANT'S FOURTH SET OF DISCOVERY REQUESTS
TO DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY**

Complainant E.I. du Pont de Nemours & Company ("DuPont"), pursuant to 49 C.F.R. §§ 1114.26 and .30, hereby submits its Fourth Set of Discovery Requests to Defendant, Norfolk Southern Railway Company ("NS"). The numbering of Requests for Production in this Fourth Set of Discovery Requests is continued from the previous set of discovery requests.

Responses to these requests should be delivered to the offices of Thompson Hine LLP, 1920 N Street, N.W., Suite 800, Washington, D.C. 20036, within twenty (20) days, unless the parties agree otherwise. DuPont is prepared to cooperate with NS to facilitate the expeditious production of documents with minimum practical burden.

DEFINITIONS AND INSTRUCTIONS

DuPont hereby incorporates by reference all of the Definitions and Instructions from Complainant's previous sets of Discovery Requests to NS.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 171

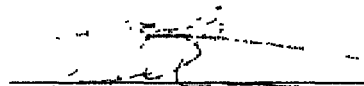
Please produce an electronic database that identifies the specific NS milepost associated with each of the unique NS SPLC and each of the unique NS operating station code that are included on the entire NS system.

REQUEST FOR PRODUCTION NO. 172

Please produce all computer programs and simulation software currently used by NS to simulate or model a rail network equipped with Positive Train Control ("PTC"), including, but not limited to:

1. A functional version of the Rail Traffic Controller ("RTC") model with the PTC functionality enabled.
2. Other software that is capable of simulating operations of a railroad equipped with PTC.
3. Software that is capable of developing the operating benefits of installing PTC over any given segment of a railroad network.

Respectfully submitted,



Jeffrey O. Moreno

Sandra L. Brown

Jason D. Tutrone

Thompson Hine LLP

1920 N Street, N.W., Suite 800

Washington, D.C. 20036

(202)331-8800

*Counsel to E I du Pont de Nemours &
Company*


September 29, 2011

Certificate of Service

I hereby certify that this 29th day of September 2011, I served a copy of the foregoing via e-mail and first class mail upon:

G. Paul Moates
Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
pmoates@sidley.com
phemmersbaugh@sidley.com

Counsel for Norfolk Southern Railway Company



Jason D. Futrone